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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 109

EDWIN K. ATWOOD, ALICE B. ATWOOD, RUTH P. FISHER and THOMAS H. FISHER,

Petitioners,

vs.

GILBERT KERLIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, Edwin K. Atwood, Alice B. Atwood, Ruth P. Fisher and Thomas H. Fisher, respectfully pray this Court's writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Seventh Circuit in this case.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit in this case appears to be not yet reported. It is reprinted in full as Appendix I to this Petition.

The final judgment of the United States District Court for the Southern District of New York appealed from in this case is reprinted in full as Appendix II to this Petition. It is reported as 169 F. Supp. 134.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Court of Appeals was filed and its judgment was rendered on January 28, 1959. Petitioners' Petition for Rehearing was denied with a supplemental opinion on March 16, 1959. The Petition for Rehearing is reprinted in full as Appendix III and the supplemental opinion is printed in full as Appendix IV.

This Court's jurisdiction is invoked under Section 1254(1) of the United States Judicial Code (U.S.C.A. Tit. 28, Sec. 1254(1)), which confers upon this Court jurisdiction to review decisions of the United States Courts of Appeals.

THE QUESTIONS PRESENTED FOR REVIEW.

The questions for review are:

(1) Did the Court of Appeals err in affirming the judgment of the District Court, which was *summarily* entered without any trial or hearing on the merits in this trust-accounting suit brought by Petitioners, as beneficiaries of a trust against Respondent, as the trustee thereof, and which was based solely upon the trustee's unverified account of the trust funds held by him, and upon conflicting affidavits filed by Petitioners as beneficiaries of the trust, on the one hand, and by Respondent as trustee, on the other hand?

(2) Were Petitioners deprived of their right to their "day in court" and to due process of law under the 5th Amendment to the Federal Constitution because Petitioners were deprived by *summary* judgment of their right to discovery from Respondent under the Federal Rules and of their right to a trial "in open court" upon the merits of the issues raised by the pleadings as to the accuracy and propriety of the trustee's account?

STATEMENT OF THE CASE.

Petitioners filed this action as Plaintiffs in 1951 to compel Respondent, as trustee, to account to Petitioners, as beneficiaries of a trust, for the trust assets held by the trustee, and for other relief.

Upon the completion of certain litigation between the same parties in the State Courts of Texas (not relevant here), the trial judge, upon Petitioners' motion, ordered Respondent to file his trustee's account in this case within 30 days (76a-77a). This order directed Respondent to account to Petitioners "for the Plaintiffs' rights, title and interests" in certain properties held in trust for Petitioners by Respondent (76a).

Respondent filed his trustee's account within the 30-day period (77a-84a). Thereupon Petitioners duly filed their objections thereto (105a-109a). The trustee's account showed (84a) that Respondent owed Petitioners the sum of $15,105.82 under the trust agreement, *but Respondent failed to account (as Petitioners claim) for the entire corpus of the trust comprising some $170,000* (148a-152a). Petitioners' objections to Respondent's trust account included their demand that Respondent disclose the entire corpus of the trust, upon the ground that without such disclosure "It is impossible for this court or plaintiffs to know" if the trustee's account was correct (108a).

Respondent, however, moved the trial court

(a) To settle, approve and confirm his trustee's account and to overrule Petitioners' objections thereto, and

(b) For *summary* judgment under Federal Rule 12(b)(6) (109a-111a).

Thereupon both Petitioners and Respondent filed extensive conflicting affidavits dealing with the anticipated issues raised by the trustee's account.

Petitioners' affidavits set forth in detail the facts which (as Petitioners claim) showed that the trustee had acted in bad faith in concealing from Petitioners their ownership of a portion of the trust properties and in attempting over a long period of years to deprive Petitioners thereof. Petitioners' affidavits also showed that Respondent had received trust funds in the sum of $170,764.09, but had never accounted to Petitioners therefor (except insofar as Respondent had voluntarily charged himself with the sum of $15,105.82). Petitioners renewed in their affidavits their demands for a "day in court" by a trial in open court upon the merits of all of the accounting issues raised by their objections to Respondent's trustee's account.

Petitioners thus made it perfectly clear to the trial court that they were insisting that this case be *not* disposed of *summarily* upon the conflicting affidavits filed by the parties, but that on the contrary Plaintiffs were entitled to and were demanding their "day in court" by a trial in open court upon the merits of the account filed by Respondent, as trustee, and Petitioner's objections thereto.

On May 13, 1957, the trial judge filed a Memorandum (179a-193a). In his Memorandum the trial judge summarily ruled upon only three of Petitioners' numerous objections to the trustee's account (180a, 184a-186a); and without granting Petitioners any discovery by requiring Respondent to give his deposition or by requiring Respondent to produce any of his trustee's books, records and accounts, and without granting Petitioners their "day in court" by a trial in open court upon the merits of any

of the issues raised by Petitioners' objections to the trustee's account, the trial judge held that the three objections referred to were without merit (186a).

The trial judge concluded his Memorandum by saying (193a):

"It is time this litigation came to an end."

despite the fact that the trial judge by his own orders had deprived Petitioners of their efforts to obtain discovery from Respondent, and despite the fact that Petitioners had never had their "day in court" by a trial upon the merits of any of the conflicting issues raised by the trustee's account and by Petitioners' objections thereto.

Petitioners being dissatisfied with the trial judge's Memorandum, they timely filed their motion that they be granted their "day in court" by a trial in open court upon the merits (242a-271a).

On July 24, 1957, the trial judge entered the final *summary* judgment herein appealed from. The trial judge denied Petitioners' motion for discovery and inspection of relevant documents pursuant to Federal Rule 34; overruled Petitioners' objections to Respondent's account; confirmed the trustee's account; directed Respondent to pay Petitioners the sum of $16,656.07, by depositing the same with the Clerk of the District Court in the form of a certified check payable to Petitioners; and authorized the Clerk to deliver the check to Petitioners' attorneys upon receiving a satisfaction of said judgment. The final *summary* judgment further released Respondent of any further liability to Petitioners under the trust agreement, and retained jurisdiction to carry the *summary* judgment into final effect (280a-281a).

Petitioners timely appealed from the *summary* judgment to the United States Court of Appeals for the Second Circuit. In affirming the trial court's *summary* judgment, the Court of Appeals assumed the main issue in the case by stating in its opinion:

> "Defendant [Respondent] has fully disclosed all money [held by him as trustee] . . ."

The only conceivable basis for this assumption by the Court of Appeals, *i.e.*, that Respondent had fully disclosed all of the trust funds, was the trustee's unverified account and the trustee's self-serving affidavits. The accuracy of both the trustee's account and the trustee's affidavits was challenged by Petitioners' objections to the trustee's account and by Petitioners' affidavits.

The Court of Appeals said in its opinion that there were no "controverted facts", but merely disagreements as to the legal consequences of *admitted* facts, or disputes as to the legally correct interpretation of documents and exhibits. *This finding was simply untrue.* Every material fact in the trustee's account and in the trustee's self-serving affidavits was directly controverted by Petitioners' objections to the trustee's account and by Petitioners' affidavits.

The Court of Appeals further held that it found no evidence whatever of bad faith on Respondent's part. However, Petitioners' affidavits plainly disclosed bad faith on Respondent's part (56a-60a, 63a-70a, 113a-117a, 122a-126a, 132a-153a, 153a-179a, 193a-212a).

The Court of Appeals' opinion was no more than an incorrect statement that Petitioners had *agreed* (despite their repeated statements that they did *not* agree) that Respondent's trustee's account was complete and correct,

and that Petitioners had further *agreed* (though they did *not* agree) that Respondent was not guilty of any bad faith in administering the trust for Petitioners' benefit.

The Court of Appeals in effect overturned its prior decisions in *Subin* v. *Goldsmith*, 224 F. (2d) 753, cert. den. 350 U.S. 883, and *Alvado* v. *General Motors Corp.*, 229 F. (2d) 408, cert. den. 351 U.S. 983, and the other like cases decided by the United States Supreme Court and the other United States Courts of Appeals to which reference is made in the Argument below.

Petitioners expressly raised and relied upon their constitutional rights to their "day in court" as a part of their right to due process of law under the 5th Amendment to the Federal Constitution in their Reply Brief (p. 16) filed in the Court of Appeals. Under the sub-heading "Issues Raised on This Appeal Under the Federal Constitution", Petitioners stated that they were "deprived of due process of law under the 5th Amendment by the entry of the final summary judgment appealed from, because they were deprived thereby of their right to discovery from Defendant [Respondent] under the Federal Rules and of their right to a trial 'in open court' of the issues raised by the Complaint, as supplemented and amended, and by Defendant's [Respondent's] obligation to account as a fiduciary to Plaintiffs [Petitioners]" (264a, 266a).

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

Petitioners are admittedly beneficiaries, and Respondent is admittedly a trustee, of certain funds held by Respondent for Petitioners.

Petitioners' right to appeal to a court of equity for a settlement of the trustee's account, including Petitioners' right to a full disclosure from Respondent, as their trustee, not only of all of the admitted trust assets in the trustee's hands, but also of other assets claimed by Petitioners to be subject to the trust, is a right which has existed in the chancery courts for centuries, and which has never been heretofore doubted or disputed.

There can be no doubt or question in this case as to Respondent's obligation to account as trustee to Petitioners as beneficiaries of the trust, because the District Court ordered Respondent to file his trustee's account and because Respondent, as trustee, then did so (76a-77a).

The sole question on this appeal, therefore, is whether Petitioners may be deprived of their right to their "day in court" to have a full discovery and a trial on the merits in open court of their claims against the trustee, and to have a settlement of the trustee's account, by a *summary* judgment entered by the trial court (and affirmed on appeal) which has been based solely upon the trustee's unverified account and upon the trustee's self-serving affidavits, every material fact of which has been contradicted by Petitioners' affidavits.

Petitioners are not asking this Court to grant the writ of certiorari to determine any issue as to the accuracy of the trustee's account, but solely for the purpose of re-

versing the Court of Appeals and directing the trial court to vacate the *summary* judgment, upon the ground and only upon the ground that the District Court had no power or jurisdiction to enter a *summary* judgment in a trust accounting case, without granting the beneficiaries of the trust discovery and their "day in court" to determine the accuracy and validity of the trustee's account.

The *Subin* and *Alvado* cases to which reference is made in the Statement of the Case above set forth the salutary rule that a plaintiff shall never be deprived of his rights by a *summary* judgment in the trial court, *even if he files no counter-affidavits to those filed by the defendant*, where the facts in dispute are peculiarly within the defendant's own knowledge, especially where a question of the defendant's good faith is involved. *Subin* v. *Goldsmith*, 224 F. (2d) 753, cert. den. 350 U.S. 883; *Alvado* v. *General Motors Corp.*, 229 F. (2d) 408, cert. den. 351 U.S. 983. This salutary rule has been followed by this Court and by other Courts of Appeals. See, for example, *Colby* v. *Klune*, 178 F. (2d) 872; *Fogelson* v. *American Woolen Co., Inc.*, 170 F. (2d) 660; *Arnstein* v. *Porter*, 154 F. (2d) 464; *Doehler Metal Furniture Co.* v. *United States*, 149 F. (2d) 130; *Sartor* v. *Arkansas Natural Gas Co.*, 321 U.S. 620; *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249.

In dealing with the *Subin* and *Alvado* cases, the Court of Appeals stated that the principle therein established was "completely inapplicable" to the case at bar, though for what reason is not disclosed in the Court of Appeals' opinion. The plain truth is that the judgment of affirmance in the case at bar in effect, though without saying so, reversed both the *Subin* and *Alvado* cases, as well as all of the other like cases decided by this Court and the other Courts of Appeals.

In their Petition for Rehearing, Petitioners expressly requested the appeals court to show how or why the principle of the *Subin* and *Alvado* cases was "completely inapplicable" to the case at bar or, alternatively, to state frankly that it was intending to reverse that principle in this case. This the appeals court refused to do in its supplemental opinion denying the Petition for Rehearing.

As if to add insult to injury, the Court of Appeals also said that *Petitioners'* "good faith is to be doubted", by quoting this expression in the trial court's Memorandum in a footnote to the opinion. The Court of Appeals did not, however, show in its opinion any ground either for upholding *Respondent's* good faith, or for doubting *Petitioners'* good faith, and ignored the fact that the documents and exhibits upon which these conclusions depended contained only controverted and disputed facts, and that Petitioners had been deprived by the *summary* judgment of their right to a trial in open court on the merits of the factual issues raised in the District Court.

As Petitioners pointed out in their Petition for Rehearing, it is now centuries too late for a court of chancery to charge trust beneficiaries with want of "good faith" *merely because they have asked the chancery court for a court accounting by their trustee.* Yet this is the only conceivable ground for the charge that Petitioners' "good faith is to be doubted."

There can be no doubt whatever that the Court of Appeals' decision affirming the *summary* judgment of the trial court deprived Petitioners of their "day in court" by compelling them to accept the trustee's account filed by Respondent *without any opportunity on Petitioners' part to test its accuracy or completeness by a trial in open court upon the merits in a court of equity.*

This Court will particularly note, from a reading of the Court of Appeals' opinion, how an attempt has been made therein to make it appear that Petitioners have *voluntarily surrendered* their rights to a trust accounting by Respondent, as their trustee, *when in truth and in fact Petitioners have never done any such thing*, as their objections to the trustee's account and their affidavits in opposition to the trustee's self-serving affidavits on the summary judgment motion conclusively show (105a-109a, 56a-60a, 63a-70a, 113a-117a, 122a-126a, 132a-153a, 153a-179a, 193a-212a).

In this case Petitioners have been deprived of their substantial property rights, as well as their right to procedural due process of law, in defiance of the provisions of the 5th Amendment to the Federal Constitution, for the reason that Petitioners have been prevented from having discovery and their "day in court" to test the accuracy of the trustee's account in a court of chancery, a right which existed unimpaired in such courts for centuries past.

Only by this Court's issuance of its writ of certiorari can this result be prevented.

CONCLUSION.

We recognize that the granting of the Petition for Certiorari is discretionary with the Court and that such writ will not be granted merely because of error by the District Court or the Court of Appeals unless such error contravenes fundamental Federal law.

In the case at bar, the violation of the Federal law is so plain and undeniable that Petitioners submit that they have been deprived of their fundamental rights under the 5th Amendment to the Federal Constitution.

PRAYER FOR THIS COURT'S WRIT OF CERTIORARI.

For reasons apparent from the record and stated in this Petition for Certiorari, Petitioners respectfully pray that this Court issue its writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Second Circuit in this case, with directions to that Court to reverse the *summary* judgment of the District Court and to grant Petitioners their constitutional rights to discovery and a trial in open court upon the merits of the trustee's account in due course.

Respectfully submitted,

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ARGUMENT.

When the history of 20th Century justice is finally written, it will be clear that the American courts have all too often given the American public only *theoretical* justice, not *actual* justice. Out of the American courts of appeal, both State and Federal pours an unending stream of reported and unreported opinions and decisions. These opinions carefully state "facts" and "legal conclusions" which fit them into the body of judicial precedent in a manner which is not inconsistent with the *theoretical* structure of our law. Thus we achieve *theoretical* justice.

But do we achieve *actual* justice? We do not. And why not? Because a vast number of the learned opinions and decisions of our Courts of Appeal are based upon supposed "facts" which never existed and supposed "issues" which were never raised in the manner described in the opinions of the judges.

There are several signs which will serve to warn the wary in this matter. When a legal opinion contains such a statement of the case as to indicate that the client and his attorney who urged it are nearly, if not absolutely, perfect imbeciles, it may safely be assumed that it is the Appeals Court which is misstating the "facts" and misconceiving the "issues", not the litigants who have been idiotic enough to have presented them. Similarly, if a losing party or his attorney is said to have *conceded* his case to his opponent by some written expression in his brief, or by some expression in oral argument, the chances are that the particular written or oral "admission" was never made but is based upon a plain distortion of the meaning intended by the author.

What has all this to do with this case? Just this: We have here a particularly clear example of an opinion by an Appeals Court which plainly is based entirely upon "facts" and issues which never existed, as well as upon supposed concessions and admissions of Petitioners as the losing litigants which were never made by them.

The principal question of fact is whether Respondent, as trustee, has fully disclosed all trust funds received by him in which Petitioners claim an interest as beneficiaries of his trust. Respondent had filed his trustee's account in which he discloses *only that portion of the trust funds* which he concedes he holds for Petitioner, *i.e.*, the sum of $15,105.82 (77a-84a). But Respondent has *refused* to disclose the balance of the trust funds, totaling some $170,764.09 (inclusive of the $15,105.82). The conflicting affidavits of the parties show that the principal dispute of fact between them is the nature and source of these entire funds totaling $170,764.09.

What does the Court of Appeals do with this question of fact? It says in its opinion:

> "Defendant [Respondent] had fully disclosed all money [held by him as trustee] . . ."

This statement is wholly and unqualifiedly contrary to the record. In fact, Respondent himself does not deny in his affidavits that he collected $170,764.09, but merely denies that Petitioners have any greater interest therein than $15,105.82. The Court of Appeals has abused its power by deciding the principal issue of fact adversely to Petitioners *without any justification whatsoever in the record.*

Another issue of fact raised by Petitions is whether Respondent, as trustee, is guilty of bad faith by actually and deliberately concealing from Petitioners the trust proper-

ties in which they claim an interest. The facts proving this actual and deliberate concealment are set forth in detail in Petitioners' affidavits. What does the Appeals Court do with these facts? It ignores them and thereby concludes that there is no showing of bad faith on Respondent's part.

But the opinion of the Appeals Court goes further. It pretends, *first*, that Petitioners have *themselves admitted* that there are no "controverted facts", and *second*, that Petitioners have *themselves agreed* that Respondent is not guilty of bad faith in administering the trust for Petitioners' benefit. *Thirdly*, the Appeals Court (albeit, in a footnote to its opinion) quotes with implied approval an expression in the trial court's Memorandum which says that *Petitioners'* "good faith is to be doubted".

Petitioners, however, have never made any such admission or agreement. Nor is there *any ground whatsoever* for the trial court's "doubt" as to Petitioners' "good faith", nor any justification for the reference thereto in the footnote of the Appeals Court's opinion.

As to the legal issues, the crucial one is whether a *summary* judgment is proper in a case brought by the beneficiaries of a trust against their trustee for a court settlement of his accounts, in which all of the material issues of fact are controverted by the conflicting affidavits of the parties. By a *summary* judgment is meant, of course, one which is NOT based upon a trial in open court of the disputed facts and issues, following discovery procedures under the Federal Rules by the litigants prior to the trial.

We shall not bother to cite to this Court the many decisions holding that procedural due process of law under the 5th and 14th Amendments compels the granting to

litigants of a "day in court" for just this purpose. Instead we point to the *Subin** and *Alvado*** cases cited in the Petition for Certiorari above, *which expressly held that a summary judgment is never proper in any case in which the facts in dispute are peculiarly within the opponent's knowledge*, especially where an issue of the opponent's good faith is involved, even if the opponent's affidavits asserting his own good faith are unchallenged.

What does the Appeals Court do with this crucial legal issue? It says that the principle of the *Subin* and *Alvado* cases is "completely inapplicable" to this case. **Why?** The Appeals Court not only fails to say why in its original opinion, but refuses to say why, when challenged in Petitioners' Petition for Rehearing, in its supplemental opinion.

The plain unvarnished truth is that the principle of the *Subin* and *Alvado* cases, as well as of all the other Federal cases to the same effect (cited above in the Petition), is *precisely applicable to this case*; and the Appeals Court would be utterly unable to show the contrary, if it should attempt to do so.

Thus we have in this case the perfect illustration of an Appeals Court's opinion which is based upon "facts" which never existed and issues of law which were never raised and upon "admissions" which were never made by the litigants.

Why, then, should this Court grant certiorari? Because it is the failure of the Courts of Appeals to grant litigants procedural due process of law in the sense here complained

*Subin v. Goldsmith, 224 F(2) 753, cert. den. 350 U.S. 883.

**Alvado v. General Motors Corp., 229 F.(2) 498, cert. den. 351 U.S. 583.

of which is the real reason for the breakdown in *actual*, as distinguished from *theoretical*, justice in this country. If this Court will take only a few of the multitudinous opportunities presented to it to grant certiorari for want of due process of law because of "facts" which never existed and legal issues which were never raised, and "admissions" which were never made, as found by the Courts of Appeal, there will be an electrifying improvement in *actual*, as distinguished from *theoretical*, justice in the U.S.A.

This is not a case in which the Court is asked to examine the record to discover whether there was a sufficiency of evidence at the trial to support the judgment below. This is a case in which there was *no trial*, and in which a *summary* judgment was rendered based upon conflicting affidavits *which contain no support for the judgment*, and upon "admissions" *which were never made by the losing litigants*. Thus there was no procedural due process of law in this case in the Constitutional sense. We therefore do not have here the situation in the recent case of *New York Life Insurance Company* v. *Dick*, in which Mr. Justice Frankfurter's dissenting opinion objects to this Court's granting certiorari "to examine records for sufficiency of evidence" following an actual trial on the merits in the trial court.

It may interest the Court to read the remarks of Lord Denning, one of the Lords of Appeal in the English House of Lords, delivered at Oxford on May 22, 1959. He said:

> "The House of Lords is more than another court of law. It is more than another court of appeal. It is the court of Parliament itself. It acts for the Queen as the fountain of justice in our land.

> *"It must, of course, correct errors that have been made by the courts below.* But it should do more. It lays down, or should lay down, the fundamental principles of the law to govern the people, and while adhering firmly to those principles *it should overrule particular precedents that it finds to be at variance with them.*
>
> "Then only shall we be able to claim that 'freedom broadens slowly down from precedent to precedent'."

The Court will note that correction of errors is the first consideration of the House of Lords, and only after that comes the establishing of precedents in accordance with fundamental principles, and the correction of erroneous precedents.

The case at bar is one in which this Court should seize the opportunity to grant certiorari.

Respectfully submitted,

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